2000

State of Utah v. Bobby Hodges : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 20000139-CA
v.	:	
BOBBY HODGES,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLANT

ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT
BEAVER COUNTY, STATE OF UTAH

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ORAL ARGUMENT REQUESTED

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NATURE OF PROCEEDINGS AND JURISDICTION

Defendant appeals from the final Judgment, Sentence and Commitment entered by the Honorable J. Philip Eves of the Utah Fifth Judicial District Court, Beaver County, on January 19, 2000, which was based upon Defendant's conviction of attempted assault by a prisoner, a class A misdemeanor, in violation of Utah Code Ann. §§ 76-5-102 and 76-4-101.

This Court has jurisdiction pursuant to Utah Const. Art. I, § 12, as well as Utah Code Ann. § 78-2a-3(2)(e) and Utah R. Crim. P. 4(a).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

1. Whether the trial court judge committed an abuse of discretion by ordering that restitution be paid within six months of the date of sentencing rather than six months from the date of Defendant's release?

A trial court's determination of restitution at a criminal sentencing is reviewed on an "abuse of discretion" standard. See State v. Schweitzer, 943 P.2d 649, 651 (Utah App. 1997). Cf. Utah Code Ann § 76-3-201(4)(a)(i).

2. Whether the trial court judge committed an abuse of discretion by sentencing Defendant to serve a jail term to run consecutive to his present prison term?

A trial court's decision to order a concurrent rather than a consecutive sentence is reviewed on an "abuse of discretion" standard. See State v. Schweitzer, 943 P.2d 649, 651 (Utah App. 1997). Cf., Utah Code Ann. § 76-3-401.

STATUTORY PROVISIONS

This appeal involves the following statutes, which are reproduced in the addendum:

Utah Code Ann. § 76-3-401(2).
Utah Code Ann. § 76-3-401(4).
Utah Code Ann. § 76-3-201(4)(a)(i).

STATEMENT OF THE CASE & FACTS RELEVANT TO REVIEW

On December 8, 1999, Defendant Bobby Hodges appeared before Judge J. Philip Eves of the Utah Fifth District Court for the purpose of entering a change of plea, pursuant to a plea agreement reach with the State of Utah in which the State "agree[d] to file an amended information charging attempted assault by a prisoner, a Class A Misdemeanor, and the defendant agree[d] to plead guilty to that charge. . . . and pay restitution in the amount to be determined by the court" (C.P. Tr. at 1-3, 6-7).[1]

After accepting the entry of Defendant's plea, the Court next addressed the issue of sentencing and whether a presentence investigation should be undertaken in the case, and asked Defendant whether he "underst[ood] what a presentence investigation is." (C.P. Tr. at 13).

The Defendant responded, "Yes. But I have no problem paying on the restitution once I get off. I'm able to pay it, but not until then, because I have no accesses of getting to my money from here" (C.P. Tr. at 13-14).

After further questioning from the Court, Defendant subsequently agreed that a presentence investigation should be done, and a sentencing date was set (C.P. Tr. at 14).

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[1]"C.P. Tr." refers to the transcript of the Change of Plea dated December 8, 1999. The pagination of the volume is cited separately from the trial record, and separately from the transcript of the January 19, 2000 Sentencing.

At the subsequent January 19, 2000 sentencing, evidence contained in the presentence investigation was reviewed to collaborate Defendant's role in the jail altercation, for the purpose of persuading the Court to order that Defendant be required to pay only $10,000 of the $20,658.17 restitution amount, or his "fair share" (S. Tr. at 9-10).[2]

After conceding that "Mr. Hodges doesn't have a very big ability to pay restitution while he's incarcerated," and suggesting that the payment of restitution "be attached to his parole when he gets out on parole," the State agreed to join in the recommendation that restitution be set at less than the full amount if payment could be based on some kind of "structure"(S. Tr. at 13).

Inquiring of the Defendant regarding "what kind of structure" he would propose, the Court asked the Defendant "when would the $10,000 be paid?" (S. Tr. at 13).

Defendant, who had previously indicated that the funds could be collected "from family members and from friends" in exchange for work which he would do for them after his release "in the near future," indicated that "the full $10,000 could be paid within six months," meaning six months from the date of release (S. Tr. at 9, 13).

In addition to hearing Defendant's statements regarding restitution, in addressing the issue of Defendant's jail term the trial court also heard statements from Defendant regarding his culpability as a participant in the prison assault, and regarding the recent

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[2]"S. Tr." refers to the transcript of the Sentencing dated January 19, 2000. The volume is paginated separately from the trial record, and separately from the transcript of the December 8, 1999 Change of Plea.

emergence of new witnesses who were willing to present testimony on his behalf at sentencing. Commenting on the belated decision of the other inmates to come forward on his behalf, the Court stated, "Sure would have been a lot more simple if they would have said that in the first place, hu?" (S. Tr. at 14). The Court then further remarked:

> Well, if you'll pardon a little digression . . . that's one of the problems with those that you are doing time with, is that they don't understand the rules that make[] society operate. If they had come forward in the first place, you might not even be standing there convicted. But because they honored this code of silence, you are now suffering the consequences.

(S. Tr. at 15). Defendant was subsequently sentenced to serve "a year in the county jail, consecutive to the term that [he] is currently serving," and ordered to pay "$10,000 restitution within the next six months," or the "entire amount of restitution upon his release" if the $10,000 is not paid in six months of sentencing (S. Tr. at 15-16).

SUMMARY OF ARGUMENT

1. The trial court acted with inherent unfairness by rashly disregarding Defendant's statements concerning his ability to pay restitution while incarcerated, by treating Defendant worse than it would have treated a non-prisoner facing similar assault charges, and by treating Defendant with hostility in its candor toward him.

2. By disregarding Defendant's statements concerning his ability to pay restitution while incarcerated, the trial court adopted a view that no reasonable person would take.

3. Rather than considering legally relevant and proper factors such as the circumstances surrounding the offense and Defendant's rehabilitative needs, the trial court appears to have base its concurrent sentence upon Defendant's status as a State prison inmate.

ARGUMENT

I. THE TRIAL COURT JUDGE COMMITTED AN ABUSE OF DISCRETION BY ORDERING THAT REDUCED RESTITUTION BE PAID WITHIN SIX MONTHS OF THE DATE OF SENTENCING RATHER THAN SIX MONTHS FROM THE DATE OF DEFENDANT'S RELEASE.

As outlined in State v. Schweitzer, 943 P.2d 649 (Utah App. 1997)[hereinafter Schweitzer], "[t]he imposition of a sentence 'rests entirely within the discretion of the [trial] court, within the limits prescribed by law.'" Id. at 651 (citing State v. Peterson, 681 P.2d 1210, 1219 (Utah 1984)[hereinafter Peterson). As a result, an appeals court must "'review the sentencing decisions of a trial court for abuse of discretion.'" Id. (citing State v. Houk, 906 P.2d 907, 909 (Utah App. 1995)[hereinafter Houk]). Furthermore, "Abuse of discretion may be manifest if the actions of the judge in sentencing were 'inherently unfair' or if the judge imposed a 'clearly excessive sentence.'" Id. What's more, an Appeals Court "may find an abuse of discretion only if [it] conclude[s] that 'no reasonable [person] would take the view adopted by the trial court.'" Id. (citing State v. Gerrard, 584 P.2d 885, 887 (Utah 1978)). Decisions regarding such orders of restitution made at sentencing are governed by Utah Code Ann. § 76-3-201(4)(a)(i).

The Defense now considers the factors of inherent fairness and reasonableness in analyzing the "structure" of restitution payments ordered by the trial court at sentencing (S. Tr. at 13).

A. The actions of the trial court judge at sentencing were inherently unfair.

A trial court's sentencing decision can be considered "inherently unfair" if the judge treats the Defendant "worse than other defendants," if the decision was made

"rashly," or if the decision was made with "hostility." Cf. Houk, supra, 906 P.2d at 909.

In the present case, the facts indicate that the sentence imposed by the court was made "rashly." Id. Despite the trial court's finding "that the defendant does not have the current ability to pay [restitution], at least, not while he's in custody," the trial court nonetheless ordered that if "Defendant pays $10,000 restitution within the next six months, that he will not need to pay the remainder of the restitution." (S. Tr. at 15). Although the reduction of the restitution amount was indeed in keeping with Defendant's request that restitution be lowered, the "schedule" of payment imposed by the court for payment of the $10,000 "within the next six months" clearly was not in keeping with Defendant's assertion that despite the help of "family members and from friends" in gathering the money together "in the very near future"(S. Tr. at 15, 9-10), he nonetheless would only be able to gather the money from these people "once I get off" (C.P. Tr. at 13-14). Specifically, Defendant informed the trial court, "I'm able to pay it, but not until then, because I have no accesses of getting to my money from here" (C.P. Tr. at 13-14). By failing to take cognizance of these representations, or by choosing to disregard them entirely, the Court acted in a "reckless" and "hasty" fashion. See Webster's New World Compact School and Office Dictionary 355 (1989)(defining the term "rashly")[hereinafter Webster's Dictionary].

The facts of the present case also indicate that in imposing its sentence, the trial court treated Defendant "worse than other defendants" because of his status as a jail inmate. Cf. Houk, supra, 906 P.2d at 909. It is apparent that the trial court conditioned the lowering of restitution upon conditions which it believed the Defendant could not

meet. As mentioned above, the Court found "that the defendant does not have the current ability to pay [restitution], at least, not while he's in custody" (S. Tr. at 15). It is also apparent that the decision to limit the reduction in restitution to the period of Defendant's incarceration was based upon Defendant's status as a prison inmate (S. Tr. At 15). In addition, as outlined above, the trial court further stated:

> Well, if you'll pardon a little digression . . . that's one of the problems with those that you are doing time with, is that they don't understand the rules that make[] society operate. If they had come forward in the first place, you might not even be standing there convicted. But because they honored this code of silence, you are now suffering the consequences.

These cumulative statements, combined with the fact that the Court was aware or should have been aware that Defendant could not pay restitution until his release, together indicate that the trial court treated Defendant "worse" than it would have treated a non-prisoner facing similar attempted assault charges. Cf. Houk, supra, 906 P.2d at 909.

In addition, it is also apparent that the decision of the trial court was made with "hostility." Id. In addressing the Defendant in open court, the transcript evidences that the trial court judge addressed Defendant with "enmity" and "ill will." See Webster's Dictionary, supra, 208 (defining "hostility"). Examples of this include statements made by the judge such as, "[s]ure would have been a lot more simple if they would have said that in the first place, hu?" as well as the judge's sardonic response of "Um-hmm" to Defendant's explanation of the circumstances of the offense (S. Tr. at 14). With such animosity openly displayed to Defendant in the confines of a courtroom, it is apparent that the sentence imposed by the court was indeed entered with "hostility." Cf. Houk, supra, 906 P.2d at 909.

B. No reasonable person would take the view adopted by the trial court judge at sentencing.

A view held by a person may be considered reasonable if it is "fair, proper, just, moderate, [or] suitable under the circumstances." See Black's Law Dictionary 874 (abr. 6th ed. 1991)(defining reasonable).

As articulated above, the facts in the present case indicate that Despite its finding "that the defendant does not have the current ability to pay [restitution], at least, not while he's in custody," the trial court nonetheless ordered that if "Defendant pays $10,000 restitution within the next six months, that he will not need to pay the remainder of the restitution." (S. Tr. at 15). Such a ruling is not "fair, proper, just, moderate, [or] suitable under the circumstances"(Black's Law Dictionary, supra), particularly in light of Defendant's previous statements regarding the payment of restitution upon release—that "I'm able to pay it, but not until then, because I have no accesses of getting to my money from here" (C.P. Tr. at 13-14). Even with the help of "family members and from friends" who would be able to help him raise money "in the very near future," Defendant nonetheless indicated that at best the money could only be collected "within six months" of his release date (S. Tr. at 9, 13). By failing to fully consider defendant's circumstances and his statements regarding his present ability to pay, the Court adopted a view that "no reasonable person would take." See Gerrard, supra, 584 P.2d at 887.

II. THE TRIAL COURT JUDGE COMMITTED AN ABUSE OF DISCRETION BY SENTENCING DEFENDANT TO SERVE A JAIL TERM TO RUN CONSECUTIVE TO HIS PRESENT PRISON TERM

As stated in Schweitzer, supra, 943 P.2d at 651 (citing Peterson, supra, 681 P.2d at 1219), "[t]he imposition of a sentence 'rests entirely within the discretion of the [trial] court, within the limits prescribed by law.'" As a result, an appeals court must "'review the sentencing decisions of a trial court for abuse of discretion.'" Id. In addition, "a trial court may abuse its discretion in imposing a sentence without considering all the legally relevant factors." Id. (citing State v. Montoya, 929 P.2d 356, 358 (Utah App. 1996)[hereinafter Montoya]). These "legally relevant factors" are listed in Utah Code Ann. § 76-3-401(4), which reads in pertinent part as follows:

> A court shall consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant in determining whether to impose consecutive sentences.

Cf. State v. Smith, 909 P.2d 236, 244 (Utah 1995)(affirming the need for trial courts to consider the legal requirements of § 76-3-401(4) in determining whether to impose consecutive sentences); State v. Strunk, 846 P.2d 1297, 1301-1302 (Utah 1993)(also affirming the need for trial courts to consider the legal requirements of § 76-3-401(4) in determining whether to impose consecutive sentences).

The Defense now reviews the trial court's consideration of the legally relevant factors at the time of sentencing.

A. The trial court judge imposed a sentence without considering all legally relevant factors

At the time of sentencing, the Defendant attempted to review evidence regarding the circumstances surrounding his offense, and also attempted to review evidence regarding his rehabilitative needs. Specifically, Counsel for defendant read aloud to the court a statement by Mark O'Granado, a witness to the offense, who had submitted a handwritten version of the altercation to Adult Probation and Parol as part of the Pre-Sentence Investigation (S. Tr. at 8). Defendant himself also attempted to present his own account of the circumstances surrounding the offense to the court, and explain why Mr. O'Granado had only recently come forward. Defendant's statements were not considered by the trial court, however, but as indicated above were instead met with the sardonic retort of, "Um-hmm," along with the statement, "Sure would have been a lot more helpful if they would have said that in the first place, hu?" (S. Tr. at 14).

In imposing its subsequent sentence, the Court did briefly engage in a self-declared "digression" regarding the "problems with" of State prison inmates, but did not make any further meaningful consideration of the circumstances surrounding the offense (S. Tr. at 15). Nor did it consider the statements introduced by Defendant regarding his rehabilitative needs—the need for a release in the near future to begin restitution payments and the need to resume his education (S. Tr. at 10). As a result, by imposing a consecutive sentence after overtly disregarding these "legally relevant factors," the trial court committed an "abuse of discretion." See Montoya, supra, 929 P.2d at 358.

CONCLUSION

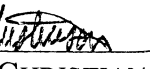
On the basis of the foregoing, the Judgment, Sentence and Commitment of the Trial Court should be vacated, and this action remanded to the District Court for a new sentencing.

ORAL ARGUMENT AND PUBLISHED OPINION

The Defendant believes that oral argument would materially assist the Court in rendering a decision in this case. Moreover, because this claim addresses potential ambiguities contained in §§ 76-3-401(2) and 76-3-401(4) of the Utah Criminal Code, relating to the "appropriate[ness]" of concurrent sentences for State prison inmates who are charged with committing new crimes during the period of their incarceration, a published opinion might provide useful guidance to the bench and the bar.

RESPECTFULLY SUBMITTED on this 4 Day of May, 2000.

BEAVER COUNTY PUBLIC DEFENDER



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Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on this 4th day of May, 2000, two true and correct copies of the foregoing APPELLANT'S BRIEF were served on the person named below by U. S. mail, first class postage prepaid, and addressed as follows:

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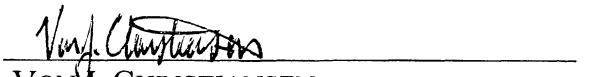

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ADDENDUM

Utah Code Ann. § 76-3-401(2).

The court shall order that sentences for state offenses run consecutively if the later offense is committed while the defendant is imprisoned or on parole unless the court finds and states on the record that consecutive sentencing would be inappropriate.

Utah Code Ann. § 76-3-401(4).

A court shall consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant in determining whether to impose consecutive sentences.

Utah Code Ann. § 76-3-201(4)(a)(i).

When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this subsection, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement. For purposes of restitution, a victim has the meaning as defined in Subsection (1)(e).